SUDALAIMUTHY CHETTIAR

v.

PERIYASAMY AND OTHERS

COURT OF APPEAL.
ATUKORALE, J. (PRESIDENT) AND T. D. G. DE ALWIS, J.
C. A. (S.C.) NO. 643/75 (F) – D. C. COLOMBO 78039/M.
JANUARY 10, 1984.

Landlord and tenant–Destruction of tenanted premises by fire–Presumption of negligence–Nature of onus on tenant–How discharged.

The appellant let out a portion of his premises on a monthly rental to the respondents who used it for storing copra. A few months later a fire broke out originating in the part let out and destroying the entire building and everything therein. The appellant filed action claiming damages on several counts. The learned District Judge found as a fact that the cause of the fire had not been established and held that the onus was on the defendants to prove that they had exercised due diligence. On a consideration of the evidence he concluded that the defendants had not been negligent and dismissed the plaintiff's action.

Held–

Where premises which have been let on rent are destroyed or damaged by fire whilst being in the exclusive possession and control of the tenant there is a presumption that the destruction or damage was due to his negligence or wrongful act. To avoid liability it is not enough for the tenant to prove that the cause of the destruction was obscure or more probably due to some cause for which he was not responsible. The tenant must satisfy Court affirmatively of the cause of the fire and that the fire was due to (1) *vis major* or *casus fortuitus*, or (2) a latent defect in the property, or (3) the act of some third person. The respondents had failed to show that the fire was caused by any one of these three causes. They had failed to show how the fire was caused. They had therefore failed to rebut the presumption that the destruction or damage was due to their negligence. Hence they are liable in damages.

Cases referred to

(1) *Bastian Pillai v. Gabriel, (1892) 1 SCR 264.*
(2) *Kulatungam v. Sabapathi Pillai, (1908) 11 NLR 350.*

APPEAL from the District Court, Colombo.

H. W. Jayewardene, Q. C., with *R. Manickavasagar* and *Ronald Perera* for plaintiff-appellant.

Defendants–respondents absent and unrepresented.

Cur. adv. vult.

March 29, 1984

ATUKORALE, J. (President)

The plaintiff, who is the appellant, is the owner of premises No. 88, Negombo Road, Wattala. On or about 6.8.1971 he let a portion of the same at a monthly rental of Rs. 1,176 to the defendants who are the partners of a business called the Central Commercial Company. It is common ground that the letting was for the purpose of storing of copra by the defendants. On 10.12.1971 a fire broke out destroying the entire building and everything therein. It was conceded that the fire originated in the portion let to the defendants which remained in their exclusive possession and control. The plaintiff filed this action claiming as damages several sums of money, namely,

(i) a sum of Rs. 154,000 for the destruction of the entire premises ;

(ii) a sum of Rs. 12,000 for the destruction of certain machinery belonging to him and alleged to have been installed in the portion let to the defendant. The finding of the learned Judge is that no such machinery was delivered to the defendant at the time of letting ;

(iii) a sum of Rs. 39,500 for the destruction of the machinery, building material and sanitaryware belonging to the plaintiff and lying in another portion which was also damaged by the fire ; and

(iv) a sum of Rs. 2,000 per month from 1.1.1972 to date of decree as continuing damages.

In paragraph 4 (*d*) of the plaint the plaintiff averred that it was an express term of the tenancy agreement 'C' that at the termination of the tenancy the premises leased out were to be handed over by the defendants in the same condition as when taken by them and that any damage will be made good by the defendants. In paragraph 12 of the plaint the plaintiff pleaded that the fire originated and spread due to the negligence of the defendants, their lack of due diligence and proper care.

Admittedly the fire originated in the portion let to the defendants. The learned District Judge found as a fact that the cause of the fire had not been established and as such he held that the onus was on the defendants to prove that they had exercised due diligence. He accepted the evidence of the defendants' witness Periyasamy that the

stacking of copra had been done with a view to avoiding contact with electric wires. He also accepted the position that the stores had been closed up for a month immediately prior to the occurrence of the fire thereby preventing any outsiders from entering the portion with any inflammable substance. He took the view that the manner in which the copra was stacked and the closing of the premises preventing any outsider from entering the same were two acts which revealed the exercise of due diligence on the defendant's part. He concluded that the defendants were not negligent and dismissed the plaintiff's action.

Learned Queen's Counsel submitted to us that the learned District Judge misdirected himself in law on the nature of the onus cast on the defendants in a case of this nature. He maintained that the onus on the defendants was to establish positively that the occurrence of the fire (which originated in the portion rented out to them) was due to unavoidable accident or an Act of God. He urged that the defendants could not succeed in discharging the burden cast on them if the cause of the fire was left unascertained. To avoid liability they must, it was contended, establish affirmatively that the fire originated as a result of an unavoidable accident or an Act of God.

I am inclined to agree with this submission of learned Queen's Counsel. In *Bastian Pillai v. Gabriel* (1) the plaintiff claimed, inter alia, the return of a jar which he had given to the defendant for use on a monthly rental or its value. The defence was that the jar had been destroyed by a fire through no fault of the defendant. Withers, J. whilst holding that the Commissioner of Requests was wrong in coming to the conclusion that the defence was on the face of it a bad one observed that the onus was on the defendant to prove that the fire which destroyed the jar was occasioned by unavoidable accident. This decision was followed in *Kulatungam v. Sabapathi Pillai* (2). In the latter case the plaintiff sought to recover damages for the destruction by fire of a house rented out by him to the defendants. The plaintiff distinctly averred that the fire was caused as a result of the negligence and carelessness of the 2nd defendant. The evidence was such that the origin of the fire was obscure. Wendt, J. following the earlier decision in *Bastian Pillai v. Gabriel* (*supra*) held that the onus lay upon the defendants of exculpating themselves by proving that the fire was due to an unavoidable accident. Grenier, J. whilst expressing the opinion that there is no hard or fast rule determining the question of onus but that it should be determined according to the circumstances

of each particular case held that the onus in that case lay on the defendants to account for the fire and the consequent damage in such a way that no legal liability should attach to them. He held that the fire having occurred the onus was on the defendants to account for it, whether it was accidental or the work of an incendiary,' if they desired to exculpate themselves. Wille in his book *Landlord and Tenant in South Africa* (4th Edition) at p. 241 referring to the nature and extent of the burden cast on a tenant of premises which has been destroyed or damaged by fire whilst being in his exclusive possession and control states as follows :

> "The onus cast on the tenant can only be discharged by proof by him that the destruction was not due to his negligence or wrongful act ; consequently he must prove affirmatively that it was due to some cause for which he is not responsible, namely, (1) *vis major* or *casus fortuitus*, or (2) a latent defect in the property, or (3) the act of some third person. Moreover, the tenant can only discharge the onus by actual proof of the cause of the loss, and a mere probability that the loss was due to some cause for which he was not responsible, is not sufficient to relieve him of liability."

In the instant case it was thus incumbent on the defendants to establish how the destruction took place for which purpose they had to prove how the fire was caused. To avoid liability they had to satisfy Court that the fire was due to one of the three causes enumerated above by Wille in the passage quoted by me aforesaid. They have failed to do so. They have thus not rebutted the presumption that the destruction or the damage was due to their negligence. The appeal is thus entitled to succeed. The judgment of the learned District Judge is set aside and judgment is entered in favour of the plaintiff in the sums specified in paragraphs (i) and (iii) of the commencement of this judgment together with continuing damages at Rs. 1,176 per month from 1.1.1972 for a period of twelve months during which the plaintiff could reasonably have re-erected the building. In the result judgment is entered for the plaintiff in an aggregate sum of Rs. 207,612 together with costs in both courts.

T. D. G. DE ALWIS, J.–I agree.

Appeal allowed.